

STATE OF MICHIGAN
COURT OF APPEALS

MIKE AIELLO,

Plaintiff-Appellee,

v

CARMELLA SABAUGH, RUTH JOHNSON, and
the MACOMB COUNTY ELECTION
COMMISSION,

Defendant-Appellees,

and

STEVE MARINO,

Intervening Defendant-Appellant.

UNPUBLISHED

June 21, 2016

No. 333461

Macomb Circuit Court

LC No. 2016-002016-AW

Before: CAVANAGH, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

Intervening defendant Steve Marino appeals of right from the circuit court's opinion and order which granted plaintiff Aiello's complaint for mandamus and ordered the Macomb County Election Commission to place Aiello's name on the ballot for the primary election scheduled for August 2, 2016. We reverse and order Mr. Aiello's name removed from the ballot.

Both Intervening defendant Marino and plaintiff Aiello are Republican candidates for the Michigan House of Representatives 24th District. One page of Aiello's nominating petition did not list the date of the primary election. The nominating petition form had a space for the date to be filled out, but the date was not filled in on that page. Without that page Aiello lacked the required signatures to be listed on the primary ballot. Marino filed a challenge to Aiello's nominating petition, arguing that the page which did not list the date of the primary could not be counted because it failed to comply with MCL 168.544c. The county clerk rejected Marino's challenge, finding that Aiello's petition substantially complied with the requirements of MCL 168.544c so he met the required number of signatures and should appear on the primary ballot for the August 2, 2016 election. Marino appealed the county clerk's denial to the Secretary of State, who determined that the statute required the date of the primary to appear on every

signature page of the petition and that this statutory requirement could not be excused based upon substantial compliance.

Plaintiff filed an action in the circuit court seeking mandamus relief to compel defendants to reinstate his name on the primary election ballot. Plaintiff acknowledged that MCL 168.544c(1) required that the nominating petition page include a blank space on the form for the date of the primary election, but argued that the statute did not expressly require the date of the primary election be filled in in the provided space or otherwise listed on the face of each page.

The circuit court agreed with plaintiff's argument and granted the relief requested. The court held that while MCL 168.544(c)(1) required that the aspiring candidate use a petition form which included the space for the date of the primary election, the statute did not require that the date be filled out or otherwise listed on the petition page. The circuit court found that there was no requirement that the blanks in the nominating petition "'shall' or 'must' be filled out," so there was no clear statutory intent that the petition must strictly comply with such a requirement. The circuit court concluded that plaintiff Aiello's nominating petition complied with all mandatory statutory requirements, so "plaintiff has a clear legal right to have his name included on the ballot" and the county clerk had a clear legal duty to certify that information to the county election commission. The court reversed the Secretary of State's decision and ordered the county clerk to reinstate plaintiff's name, office sought, and other information to the county elections commission, and ordered the commission to reinstate plaintiff on the ballot for the August 2, 2016 primary election.

Intervening defendant Marino appeals from the circuit court's June 17, 2016 opinion as of right, arguing that Aiello's petition was facially defective because it did not state the date of the primary election. Marino argues that since Aiello had no clear legal right to compel certification of his facially deficient petition the circuit court abused its discretion by ordering the elections commission to list Aiello's name on the primary ballot. We agree.

Mandamus relief is considered an extraordinary remedy which should be granted only where the plaintiff can show (1) that plaintiff has a clear legal right to performance of the duty sought to be compelled; (2) the defendant has a clear legal duty to perform that act; (3) the act is ministerial in nature, involving no discretion or judgment; and (4) the plaintiff has no other adequate legal or equitable remedy. *Berry v Garrett*, __ Mich App __; __ NW2d __ (No. 333225, June 17, 2016), slip op p 2; *Wilcoxon v City of Detroit Election Commission*, 301 Mich App 619, 632; 838 NW2d 182 (2013). In this matter there appears to be no dispute that the act involved is ministerial and that plaintiff could seek mandamus because he had no other adequate remedy available in law or equity. The sole relevant questions are whether plaintiff had a clear legal right to have his name placed on the August 2, 2016 primary ballot and whether defendants-appellees had a clear legal duty to put plaintiff's name on that ballot.

This Court reviews the circuit court's decision whether to grant mandamus relief for an abuse of discretion. *Berry*, slip op p 2. However, "whether defendants have a clear legal duty to perform and whether plaintiff has a clear legal right to performance of any such duty" are questions of law to be decided de novo on appeal. *Id.*

MCL 168.544d states in relevant part:

Nominating petitions for the offices under this act ... may be circulated on a countywide form. Petitions circulated countywide shall be on a form prescribed by the secretary of state, which form shall be substantially as provided in sections ... 544c

The relevant portions of MCL 168.544c state:

(1) ... The petition shall be in the following form:

NOMINATING PETITION

(PARTISAN)

We, the undersigned, registered and qualified voters

of the city or township of , in the county

(strike 1)

of and state of Michigan, nominate,

..... ,

(Name of Candidate)

..... ,

(Street Address or Rural Route) (City or Township)

as a candidate of the party for the

office of ,

..... ,

(District, if any)

to be voted for at the primary election to be held on

the day of , 20

This Court must look to the language of the statute as the most reliable evidence of Legislative intent and give each word its plain and ordinary meaning. *Stand Up for Democracy v Secretary of State*, 492 Mich App 588, 598; 822 NW2d 159 (2012) (M.B. Kelly, J.). This Court should “consider both the plain meaning of the critical word or phrase as well as ‘its placement and purpose in the statutory scheme.’” *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) [quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995)]. “Effect should be given to every phrase, clause, and word in the statute” and [t]he

statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended.” *Id.*

The Legislature’s use of the word “shall” indicates an intent to require mandatory action or direction. *Stand Up for Democracy* 492 Mich App at 594; *Wilcoxon*, 301 Mich App at 631. In *Stand Up for Democracy* our Supreme Court effectively rejected any “substantial compliance” standard which did not expressly appear in the statutory language. In *Stand Up*, our Supreme Court considered the type size requirement for referendum petitions under MCL 168.482(2) and concluded that petitions which did not meet those requirements were deficient so the signatures on those petitions could not be counted. The Court explained:

[B]ecause MCL 168.482(2) uses the mandatory term "shall" and does not, by its plain terms, permit certification of deficient petitions with regard to form or content, a majority of this Court holds that the doctrine of substantial compliance is inapplicable to referendum petitions submitted for certification. [492 Mich at 594].

The lead opinion in *Stand Up* concluded that the prior broad application of the substantial compliance doctrine “was repudiated by the Legislature’s subsequent adoption of MCL 168.544d.” 492 Mich at 607. The plain language of MCL 168.544d allowed “substantial compliance” with statutory requirements only to the extent that it “permits the Secretary of State to prescribe petition requirements that are in substantial compliance with MCL 168.482, MCL 168.544a, or MCL 168.544c of the Michigan Election Law.” 492 Mich 603. Since the Secretary of State’s prescribed form mandated strict compliance with MCL 168.482(2), the plaintiff could not claim substantial compliance under §544d. *Id.*

The plain language of MCL 168.544c(1) states that the nominating petition “shall be in the following form,” then sets forth the headings and blank spaces for pertinent identifying information such as the location, the identity of the candidate, his or her party, the office sought, and the date of the primary election. This information in the heading is obviously designed to provide all pertinent information in direct, readable form to any registered voters who might be asked to sign the petition. None of this information appears optional or unnecessary. The clear intent is to have the candidate provide all of this information in order to comply with the statute. It would make no sense for the Legislature to mandate use of a form which requires spaces for all of that pertinent information, yet not require the candidate to fill out those spaces to provide that information on the face of the form. The circuit court’s reasoning that §544c merely requires the use of the form without filling in the required information is contrary to the plain meaning and obvious intent behind the statutory language.

Nor does the language of §544c(2) suggest that this information can be omitted. MCL 168.544c(2) addresses only the validity of the signatures on the petition based upon what information is provided in those signatures. Section 544c(2) expressly states that lack of the signer’s printed name and zip code do not invalidate the signature, but that the lack of a signature, street address, or date of the signing will invalidate that signature and prevent it from being counted. Those “substantial compliance” provisions contained in §544c apply to signatures only, do not mention defects in the heading of the petition, and cannot be used to excuse defects in the heading of the petition.

It is not disputed that one page of plaintiff's petition did not state the date of the primary election. Since it lacked the date of the primary, the petition did not comply with §544c(1). There are no statutory provisions which would exclude this failure to comply or allow the counting of the signatures on that page under a theory of substantial compliance. Since the page did not conform, plaintiff did not have an adequate amount of signatures and is not entitled to have his name placed on the August 2, 2016 primary ballot. The circuit court erred by finding that plaintiff had a clear legal right to have his name placed in that ballot, and abused its discretion by ordering the county election commission to place his name on that ballot. We therefore reverse the circuit court's grant of mandamus relief in favor of plaintiff. The Macomb County Clerk, Secretary of State, and Macomb County Election Commission are hereby ordered to take whatever steps are necessary to remove plaintiff Aiello from the ballot for the August 2, 2016 primary election before that election occurs. A public question being involved, no costs may be taxed under MCR 7.219. This opinion shall have immediate effect pursuant to MCR 7.215(F)(2).

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad